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No. 718

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In the Supreme Court of the United States

OCTOBER TERM, 1970

DELAWARE VALLEY ARMAMENTS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. In August 1968, the Union[1] requested that the Board conduct a representation election, so that it could be certified as the bargaining representative of petitioner's production and maintenance employees (Pet. App. A30). At the pre-election hearing, petitioner stated that it would not furnish a list of the names and addresses of all eligible voters as provided for in the Board's decision in *Excelsior Underwear, Inc.*, 156 NLRB 1236, contending that the Board lacked authority to require such a list (Pet. App. A30). The Board's Regional Director rejected this

[1] International Union of Electrical, Radio & Machine Workers, AFL-CIO.

407-049—70

contention and ordered petitioner to furnish the list, stating that failure to do so would justify setting aside the election (Pet. App. A31).

Petitioner subsequently submitted a list containing the names and addresses of only 83 of the approximately 300 eligible voters. In an accompanying letter, petitioner stated that it employs mostly women and that many of them had complained of union threats and harassments and had asked petitioner not to supply their addresses. The letter further stated that petitioner had consequently asked all employees to specify whether they wanted their addresses released and that, "[a]s you can see," the vast majority did not. The letter did not specify the nature of the alleged threats and harassments, nor did it identify any of the people supposedly involved. (Pet. App. A31.)

The Union lost the election, 220 to 93 (Pet. App. A31). The Regional Director sustained the Union's objection to petitioner's refusal to furnish a complete list and directed a second election; petitioner was again ordered to produce a list of the names and addresses of all employees eligible to vote (Pet. App. A32, A7–A8, n. 2). Petitioner filed exceptions to the Regional Director's supplemental decision and a request for review with the Board (Pet. App. A32). In addition to repeating its prior allegation of union threats and harassment, petitioner charged for the first time that "a number of the Union organizers assigned to the labor campaign had known criminal records." No substantiation was offered for either

allegation. The Board denied the request, on the ground that it raised no substantial issues warranting review. (Pet. App. A32.)

When petitioner still refused to file the required list, the Board issued a *subpoena duces tecum* directing production of petitioner's records containing the names and addresses of the eligible voters (Pet. App. A33). The Board subsequently denied petitioner's petition to revoke the subpoena on the ground that "evidence was not shown of special circumstances" justifying refusal to furnish the list at any stage of the proceeding (Pet. App. A33).

2. The Board then applied to the district court, pursuant to Section 11(2) of the National Labor Relations Act (29 U.S.C. 161(2)), for enforcement of the subpoena. Petitioner filed a "Memorandum of Controlling Facts" with the court, in which it named three union representatives alleged to have "known criminal records" (Pet. App. A33–A34). The only support for this allegation was that a state court in Camden County, New Jersey, had fined one of the organizers $1,000 for bookmaking (Pet. App. A34).[2] Of the ten female employees who intervened in the district court

[2] In addition, petitioner quoted from 1957 newspaper clippings, which reported that another organizer had been arrested and charged with inciting to riot, in picketing a strike-bound plant on Long Island; there was no indication that he was convicted (Pet. App. A34). Finally, petitioner cited evidence that the third organizer had invoked the Fifth Amendment in 1957 and 1967 when asked by Senate Committees whether he was a member of the Communist Party in 1950 and 1956 (Pet. App. A34).

proceeding, seven submitted affidavits expressing their concern that release of their addresses would invade their right of privacy by exposing them to home phone calls or visits by Union organizers (Pet. App. A34). While the affidavits also repeated the Company's allegation that three Union organizers had known criminal records, none of the three was charged with threats or harassment (Pet. App. A34).

The district court enforced the subpoena (Pet. App. A19–A23), and a divided court of appeals affirmed (Pet. App. A27–A43).[3] Relying on *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759, which sustained the validity of the Board's *Excelsior* requirement, the court of appeals held that petitioner was subject to an "unquestionably valid" adjudicatory order to produce the names and addresses of eligible voters (Pet. App. A37), and further found that the Board had not abused its discretion in concluding that the reasons advanced by petitioner for not producing the list were, on their face, legally insufficient and thus did not warrant an evidentiary hearing (Pet. App. A39–A40).

3. The basic question presented by the petition is whether the Board acted properly in rejecting, without holding an evidentiary hearing, the Company's contention that possible employee harassment and invasion of privacy were valid excuses for refusing to furnish an *Excelsior list*. Such an issue turns largely

[3] The district court's order was stayed pending appeal; the court of appeals' mandate was stayed pending the filing and disposition of a petition for a writ of certiorari (Pet. App. A24–A26, A44–A45).

on the facts of the particular case and does not warrant further review. Moreover, the reasons advanced by petitioner are essentially the same as those which were rejected in other cases in which this Court has denied certiorari following its decision in *Wyman-Gordon, supra*. See *National Labor Relations Board* v. *Cone Mills Corp.*, 419 F. 2d 394 (C.A. 4), certiorari denied, 397 U.S. 1040; *National Labor Relations Board* v. *Daniel Construction Co.*, 418 F. 2d 790 (C.A. 4), certiorari denied, 397 U.S. 1039; *National Labor Relations Board* v. *Beech-Nut Life Savers, Inc.*, 406 F. 2d 253 (C.A. 2), certiorari denied, 394 U.S. 1012; *Groendyke Transport, Inc.* v. *Davis*, 406 F. 2d 1158 (C.A. 5), certiorari denied, 394 U.S. 1012; *Teledyne, Inc.* v. *National Labor Relations Board*, 405 F. 2d 1182 (C.A. 9), certiorari denied, 394 U.S. 1012. Finally, as the court below pointed out (Pet. App. A40–A41), there are adequate post-election remedies available should petitioner's fears of union interefence with a fair election prove justified. See *National Labor Relations Board* v. *Daniel Construction Co., supra*, 418 F. 2d at 792, certiorari denied, 397 U.S. 1039.[4]

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[4] The cases cited by petitioner (Pet. 17–18, 19–20, 21–24) do not control this case as they involve proceedings under Section 10(e) and (f) of the Act to review final Board orders to bargain with the certified union; the courts found that, on the facts there presented, substantial and material factual issues were raised by the employer's post-election objections so as to warrant an evidentiary hearing thereon.

For these reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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